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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 **CLEVE OTIS HULSEY,**

Petitioner,

16
17 v.

18 **BEN CURRY, Warden,**

Respondent.
19
20

C 08-1009 JSW

**RESPONDENT'S REQUEST FOR
STAY PENDING ISSUANCE OF
THE MANDATE IN *HAYWARD***

Judge: The Honorable Jeffrey S. White

21 **INTRODUCTION**

22 Cleve Otis Hulsey filed a Petition for Writ of Habeas Corpus, contending that his due
23 process rights were violated by the Board of Parole Hearings' 2006 parole unsuitability finding.
24 The Court ordered a response to the Petition. On May 16, 2008, the Ninth Circuit granted en
25 banc review in *Hayward v. Marshall*, 512 F.3d 536 (9th Cir. 2008), *reh'g en banc granted*, __
26 F.3d __, No. 06-55392, 2008 WL 2131400 (9th Cir. filed May 16, 2008), and oral argument is
27 scheduled for June 24, 2008. The en banc court in *Hayward* may decide whether this Court has
28 jurisdiction over this case, and the appropriate standard to be applied if there is jurisdiction.

1 Therefore, Respondent requests a stay of this case pending the issuance of the mandate in
2 *Hayward*.

3 ARGUMENT

4 I.

5 **THE COURT SHOULD EXERCISE ITS DISCRETION AND STAY THIS**
6 **MATTER PENDING ISSUANCE OF THE MANDATE IN *HAYWARD***
7 **BECAUSE BOTH THE BALANCE OF THE INTERESTS AND**
8 **CONSIDERATIONS OF JUDICIAL ORDER AND ECONOMY FAVOR**
9 **GRANTING A STAY.**

10 A trial court has discretion to ensure the just and efficient determination of a case by
11 staying the case pending the resolution of other proceedings where a stay would be “efficient for
12 [the court’s] docket and the fairest course for the parties.” *Leyva v. Certified Grocers of Cal.*,
13 593 F.2d 857, 863 (9th Cir. 1979). In determining whether to grant a stay, a court should
14 consider the possible damage that may result, the hardship or inequity that a party may suffer,
15 and the orderly course of justice, in terms of simplifying or complicating the issues, proof, and
16 questions of law, that could result from the issuance of a stay. *Lockyer v. Mirant Corp.*, 398 F.3d
17 1098, 1109, 1111 (9th Cir. 2005). A court should also take into account the existence of similar
18 cases that are pending in the same district court, and the probability that more are likely to be
19 filed. *Id.* Staying cases that are on the forefront of an issue provides a necessary delay, allowing
20 for resolution of the issues and resulting in uniform treatment of like suits. *Id.*

21 As the resolution of *Hayward* could significantly impact this case and numerous similar
22 cases and issuing a stay would prevent unfairness and serve the interests of judicial economy, the
23 Court should exercise its discretion and stay this matter pending the issuance of the mandate in
24 *Hayward*.

25 A. **Moving Forward with This Case Before the Finality of** 26 ***Hayward* Does Not Serve the Interest of Judicial Economy.**

27 Granting a stay in this case serves the interests of judicial order and economy. On May
28 16, 2008, the Ninth Circuit granted rehearing en banc in *Hayward*. *Hayward v. Marshall*, 512
F.3d 536 (9th Cir. 2008), *reh'g en banc granted*, ___ F.3d ___, No. 06-55392, 2008 WL 2131400
(9th Cir. filed May 16, 2008). At issue before the en banc panel in *Hayward* are two threshold

1 issues which are necessary to the resolution of this case: 1) whether California has created a
 2 federally protected liberty interest in parole for life inmates, and 2) if a liberty interest is created,
 3 what process is due under clearly established Supreme Court authority. Resolution of these
 4 issues could establish that Petitioner does not have a federally protected liberty interest in parole,
 5 potentially allowing the Court to dismiss his claims for lack of jurisdiction without requiring
 6 briefing from the parties. Moreover, it would be wasteful to proceed in this case without the
 7 Ninth Circuit's holdings in these matters, as the parties would need to brief issues that will be
 8 decided en banc and then submit supplemental briefing to apply the law as clarified in the en
 9 banc decision. The two rounds of pleadings may unnecessarily complicate the matters raised and
 10 would impair the orderly course of justice. Waiting for the resolution of *Hayward* would thus
 11 conserve Court resources, and prevent the Court from having to revisit this matter if *Hayward* is
 12 modified or reversed.

13 A stay would also serve judicial order and economy by maintaining uniform treatment of
 14 like suits, as once the law is settled it can be uniformly applied. In many habeas petitions
 15 challenging California parole decisions, the Ninth Circuit has sua sponte stayed submission of
 16 the cases until the resolution of *Hayward*. See, e.g., *Tolliver v. Carey*, no. 07-15347; *Boatman v.*
 17 *Brown*, no. 05-16199; *Smiley v. Hernandez*, no. 06-55727; *Valdivia v. Brown*, no. 08-15650;
 18 *Johnson v. Newland*, no. 04-16712; *Varner v. Brown*, no. 05-16029; *Johnson v. Finn*, no. 06-
 19 17042; *Clark v. Shepherd*, no. 06-55065; *Cooke v. Solis*, no. 06-15444.

20 Granting a stay would therefore conserve judicial resources and serve the Court's interest
 21 in orderly managing these proceedings.

22 **B. A Stay Would Not Unfairly Delay Petitioner in Pursuing His Claims.**

23 A stay of this case at the district level would not unfairly impose any additional or
 24 otherwise avoidable hardship on Petitioner. As discussed above, if the parties proceed in this
 25 case additional briefing will likely be needed after the decision in *Hayward*, perhaps delaying
 26 final resolution. Also, even if this court decides this case before *Hayward*, it is likely the losing
 27 party will file an appeal, and that appeal may be delayed pending resolution of *Hayward*. (See
 28 Arg. I.A.)

CONCLUSION

When the equities are balanced, the parties' interests and the interests of judicial economy support staying this case pending the final resolution of *Hayward*. Staying this case until challenges to *Hayward* are resolved and that decision becomes final promotes the orderly resolution of this matter, and will assist in maintaining uniformity of like suits pending before this Court and similar cases that will be filed in the future. Respondent therefore requests that the Court exercise its discretion to stay this matter pending issuance of the mandate in *Hayward*.

Dated: June 23, 2008

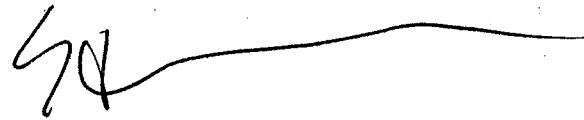
Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Cleve Hulsey v. Ben Curry, Warden*

Case No.: U. S. D. C., N. D., San Francisco Div., C 08-1009 JSW

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 23, 2008, I served the attached

**RESPONDENT'S REQUEST FOR STAY PENDING
ISSUANCE OF THE MANDATE IN *HAYWARD***

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Cleve Otis Hulsey, E-53226
Correctional Training Facility
FW-235
P.O. Box 689
Soledad, CA 93960-0686
In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **June 23, 2008**, at San Francisco, California.

J. Baker

Declarant



Signature